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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the Louisiana Supreme Court misapplied *Miller-El v. Dretke*, 545 U.S. 231 (2005), in rejecting Petitioner's claim that the prosecution struck African Americans on the basis of their race, where the prosecution struck all five qualified black panelists; provided reasons for two of its strikes which were not supported by the record, were not the subject of the prosecution's questions, and were shared by white panelists the prosecution accepted; and, in closing argument at the penalty phase, urged the all-white jury to sentence Petitioner to death because this case was "very, very, very similar" to the O. J. Simpson case, where Simpson "got away with it."

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties in the lower courts and here.

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OPINIONS BELOW

The Louisiana Supreme Court's opinion in *State v. Snyder*, 750 So. 2d 832 (La. 1999) (*Snyder I*), appears in the Joint Appendix (JA) at 668. The Court's opinion following a remand to the trial court regarding Snyder's competency for trial, *State v. Snyder*, 874 So. 2d 739 (La. 2004) (*Snyder II*), is at JA 742. This Court's order vacating the judgment and remanding the case is at JA 757. The opinion of the Louisiana Supreme Court following remand from this Court, *State v. Snyder*, 942 So. 2d 484 (La. 2006) (*Snyder III*), is at JA 759.

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court was entered on September 6, 2006, and rehearing was denied on December 15, 2006. The petition for a writ of *certiorari* was filed on March 14, 2006, and granted on June 25, 2007. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." It also involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Allen Snyder, an African American, was sentenced to death by an all-white jury in Jefferson Parish, Louisiana in August 1996. The trial occurred less than a year after the acquittal of O. J. Simpson on October 3, 1995 in the "trial of the century," which divided the country along racial lines with regard to the criminal justice system.[1] Prior to Snyder's trial, the lead prosecutor, James Williams, made public comments referring to this case as his "O. J. Simpson case." This prompted defense counsel to move to prohibit Williams from comparing this case to the Simpson case in the media and before the jury. Williams promised the trial judge, as an "officer of the court," that he would make no references to the O. J. Simpson case before the jury.

Five of the thirty-six prospective jurors from which the jury was selected were African Americans. Prosecutor Williams used his peremptory strikes to prevent all five from serving on the jury. The trial court rejected challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1996), made at the time the last three jurors were struck. In his rebuttal argument at the penalty phase of the trial, Williams broke his promise and argued to the all-white jury that the case was "very, very, very similar" to the O. J. Simpson case, where Simpson "got away with it." JA 607.

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[1] *See, e.g.*, Alex Rodriguez, *A City's Silence Turns Into Joy and Disbelief*, Chicago Sun-Times, Oct. 4, 1995 (reporting that "[r]eaction to the verdict ran the gamut of emotion, from elation to disappointment to anger" in "the most closely watched murder trial in the nation's history"); Leonard Greene, *Racism Is Still the Hot Coal the Nation Refuses to Touch*, Boston Herald, Oct. 2, 1995, at 4 (describing the case as "one of the most racially divisive trials of our history"). *See also infra* notes 40-42.

Snyder raised the *Batson* issue in a motion for new trial, arguing that the prosecutor, knowing that it would be difficult to obtain the death penalty for Snyder, "maneuvered the jury around to where it was all white" in order to have a receptive audience for his O. J. Simpson argument. JA 659. The trial court denied the motion. JA 665.

The trial occurred in a community familiar with racial divisions and appeals to race. Less than six years earlier, white supremacist David Duke, a former grand wizard of the Knights of the Ku Klux Klan,[2] carried Jefferson Parish in primaries for the United States Senate[3] and governor of Louisiana,[4] and completed a term representing a district

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[2] *See* Tyler Bridges, The Rise of David Duke 35-65, 111-38 (1994).

[3] *See* Leonard Zeskind, Op-Ed, *For Duke, Just a Start?* N.Y. Times, op. ed., Oct. 9, 1990, at A25 (observing that in the racially polarized election, Duke carried "Jefferson parish – one of the wealthiest and best educated in the state" in making a strong showing state-wide that was "a significant victory for white supremacists"); Louisiana Secretary of State, *Election Returns by Parish – Official Results for Election Date 10/06/90 U.S. Senator*, http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10069014012601 (last visited Aug. 31, 2007) (showing Duke received 52% of the vote in Jefferson Parish). Duke lost state-wide to Senator J. Bennett Johnston, who received enough votes in the primary to avoid a runoff. *Id.*

[4] Duke received 38% of the vote in Jefferson Parish in a field of twelve candidates in the primary for governor. Louisiana Secretary of State, *Election Returns by Parish – Official, Results for Election Date 10/19/91 Governor*, http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10199110012919 (last visited Aug. 31, 2007). Duke received over 40% of the vote in Jefferson Parish in losing the runoff for governor. Louisiana Secretary of State, *Election Results by Parish – Official, Results for Election Date: 11/16/91 Governor*, http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=11169110012919 (last visited, Aug. 31, 2007); Tyler Bridges, *supra* note 2, at 236.

in Jefferson Parish in the Louisiana House of Representatives.[5]

A. The Crime

Although Snyder was clearly responsible for the death of Howard Wilson, neither the circumstances of the crime nor the background of Allen Snyder made the death penalty a likely outcome in this case.[6] The Louisiana Supreme Court described the crime and the events leading to it in *Snyder I*:

> Defendant, Allen Snyder, and his wife, Mary Snyder, were having marital difficulties in the summer of 1995. Towards the end of their relationship, neither partner remained entirely faithful to the other. After several incidents of physical abuse at the hands of her husband, Mary Snyder took their children and went to live

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[5] Duke was elected to the Louisiana House of Representatives from Jefferson Parish District 81 in 1989, despite the support of Presidents Ronald Reagan and George H. W. Bush for his opponent. Tyler Bridges, *supra* note 2 at 152-53.

[6] The death penalty is to be imposed only upon the most culpable offenders who commit the most heinous crimes. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Snyder, 34 at the time of the crime, had held a responsible job, supported his family and served his country, spending four years in the United States Marine Corps and receiving an honorable discharge. JA 724; R. 1412. Unlike many defendants facing the death penalty, he did not have a long record of crimes. He had no juvenile record and had successfully completed probation for his only adult conviction, possession of cocaine with intent to distribute in 1989. JA 726. The crime in this case was the product of jealousy and depression. Thus, the jury faced a formidable task in deciding whether Snyder should be sentenced to death or life imprisonment without the possibility of parole.

> with her mother. Despite this separation, defendant contacted Mary one evening in mid-August and the two discussed the possibility of getting back together. Mary agreed to meet defendant the following day to discuss a reconciliation. Defendant was anxious to meet with Mary and wanted to see her that evening, but she put him off, telling him she "didn't want to see him" that night. Rec. vol. 6, p. 1267.
>
> Instead, Mary went out on a late night date with Howard Wilson, a married man she claimed she had recently met. Defendant repeatedly tried to page her during the evening, but Mary refused to respond. At the end of their date, at approximately 1:30 a.m. on August 16, 1995, Howard Wilson pulled his vehicle up to the home of Mary's mother to drop Mary off. Defendant walked up to the car, opened the driver's side door of the vehicle, and attacked both Howard Wilson and Mary Snyder with some sort of knife containing a double-edged blade. He inflicted nine wounds upon Howard Wilson and nineteen wounds upon Mary Snyder.

Snyder I, JA 669-70.

Howard Wilson died from his wounds; Mary Snyder survived. Allen Snyder returned to his home, barricaded himself inside and called the police twelve hours later, apparently suicidal. *Id.*; R. 1284. Police responding to the call found him curled up in a fetal position mumbling "they're coming to get me" over and over. R. 1162-68. Snyder subsequently gave a statement admitting to stabbing his wife and Wilson. JA 670-71; R. 1280-81; State's Exhibit 22 (transcript of statement).

At the time of the crime, Snyder was depressed and distraught over the dissolution of his marriage.[7] He and Mary Snyder had been married for eight years and they had three children. JA 726 (*Snyder I*). Snyder worked at the Conti Fleet Company, where he had risen through the ranks from laborer to salaried dispatcher. JA 726; R. 1256-57, 1412-14, 1448-50.

Snyder was indicted for the first degree murder of Howard Wilson. The State sought the death penalty based upon a single aggravating circumstance – that the offender knowingly created a risk of death or great bodily harm to more than one person. R. 196; *see also* La. C. Crim. P. Art. 905.4(A)(4).

B. Pretrial Motions Regarding the Prosecution's Comparisons of This Case to the O. J. Simpson Case

Upon hearing that the lead prosecutor, James Williams, was publicly referring to the case as "his O. J. Simpson case," JA 51-52, 56, 57b, defense counsel moved *in limine* "to preclude the state from making any reference or comparison whatever – direct or indirect – to other notorious prosecutions, specifically *People of the State of California v. Orenthal James Simpson.*" JA 48. Defense counsel argued in the written motion that references to the Simpson case were prejudicial and racially inflammatory, as "[s]urveys conducted since the verdicts in the O. J. Simpson trial have shown consistently that a large majority of

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[7] Snyder's depression created issues regarding his competency for trial, which were resolved in *Snyder II*, JA 742 (holding that Snyder, although on medication for depression, was competent for trial).

white Americans believe that the not guilty verdicts were wrong." JA 49.

At the hearing on the motion a week before the start of trial, defense counsel stated that "Mr. Williams has been all over two parishes talking about this is his O. J. Simpson case." JA 51. She noted that "[s]ixty-something percent of all white people in America think that O. J. Simpson got away with murder. We've got a ninety-five percent jury venire that is white." JA 52.[8]

Williams did not disavow that he had publicly compared this case to the O. J. Simpson case. Instead, he argued that granting the motion would invite "two dozen more motions seeking to keep me from saying a word during argument," JA 52, and promised to make no reference to the Simpson case during the taking of evidence. *Id.* Defense counsel replied that she was concerned "about Mr. Williams' famous arguments." JA 53.[9] Williams responded,

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[8] Counsel's representations were accurate. A USA Today/CNN/Gallup Poll found that "the verdict in the Simpson case has left white Americans bitter, cynical about the criminal justice system, and overwhelmingly convinced that race relations will worsen as a result." Joe Urschel, *A Nation More Divided,* USA Today, Oct. 9, 1995, at 5A. The poll also found that "[t]hree quarters of white Americans believe Simpson was guilty. Only one-quarter of blacks do." *Id.* These attitudes continued through and after the time of Snyder's trial. *See* Frank Newport & Sylvia Saad, *Civil Trial Didn't Alter Public's View of Simpson Case,* Gallop Poll Monthly, Feb. 1, 1997, at 21 ("Gallup polls conducted since Jul[y] 1994, show that whites and blacks remain divided over the guilt or innocence of actor and former football star OJ Simpson. . . . Whites . . . overwhelmingly believe that Simpson is guilty").

[9] Williams' "famous arguments" included two made in capital cases which the Louisiana Supreme Court reversed for improper closing argument. *See State v. Johnson*, 541 So. 2d 818 (La. 1989) (reversed for reference to defendant's failure to testify), La. S. Ct. No. 87-KA-2270, *Transcript of Rebuttal Argument of Mr. Jim Williams*, March 14, 1986,

(Continued on following page)

"[t]rust me, trust me[,]" and later asked "as an officer of this Court" to be allowed "to conduct this case in the proper manner" stating: "*I have given the Court my word that I will not*, at any time during the course of the taking of evidence or *before the jury in this case, mention the O. J. Simpson case.*" JA 53 (emphasis added). The trial court ruled: "Based on Mr. Williams' representations, I'm going to deny your motion." JA 54.

Defense counsel also moved for an order prohibiting Williams from continuing to make comments to the media comparing this case to the O. J. Simpson case. JA 55. In the written motion, defense counsel related a call received the day before trial was to begin in which "a reporter for WDSU-TV[ ] request[ed] comment on 'the O. J. Simpson trial' scheduled to begin the following day in Jefferson Parish," and "confirm[ed] that it was the District Attorney's Office which had billed this trial with the by-now infamous moniker, and intimated that it was the reference that made the story newsworthy." JA 56.

At the hearing on the motion on August 27, 1996, before the start of jury selection, Williams again did not deny comparing this case to the O. J. Simpson case. He responded that he was "a big First Amendment guy" and "this is yet another motion that if it's granted, is going to

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at 12 (transcript of Williams making the reference); *State v. Smith*, 554 So. 2d 676 (La. 1989) (reversed due to Williams' statement in argument that he had additional evidence of guilt not introduced, including statements from witnesses not called, that was consistent with testimony of witnesses who were called), La. S. Ct. No. 87-KA-0649, *Excerpt of Voir Dire, Opening Closing Argument, Closing Argument, Rebuttal Argument, Court's Charge to the Jury on the Trial on the Merits, and Bifurcated Hearing*, May 22, 1986, at 71-72 (transcript of Williams making the arguments).

bring about a tidal wave of other motions, trying to limit what I can and cannot do, and I don't think it's relevant in this case." JA 57a-57b. He concluded by saying, "Judge, I can assure you that I have no intention of speaking with the press while the case in chief is being tried. . . ." JA 57c. The trial court responded, "All right. With that in mind I'm going to go ahead and deny the motion." *Id.*

C. Jury Selection

After the court decided which persons summoned for jury duty should be excused for cause due to obligations or hardship, the remaining potential jurors were called in panels of thirteen to be questioned by the lawyers. (Seven jurors were added to one panel after seven were excused following initial questioning. JA 302-04.) The lawyers were allowed to give lengthy explanations of legal concepts,[10] to address their questions to individual jurors as well as the entire panel, and to question individual jurors at length.[11]

At the conclusion of the questioning of each panel, the court heard challenges for cause. The jurors remaining

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[10] *See, e.g.*, JA 171-81; 190-92, 193-96, 279-80, 361-64, 429-30.

[11] *See, e.g.*, JA 183-85 (series of questions to Dominick Bondi regarding his employment as police officer), 202 (series of questions to Brendan Burns about prior jury service), 285-87, 288-89 (questions to Mary Ann Calligan regarding her views on the death penalty), JA 308-09 (questions to Karen Davis about her attitudes on the death penalty), 310-11 (questions to Reubin Lottinger regarding ability to consider insanity defense), 312-15 (questions to Peter Licalli regarding ability to consider insanity defense), 376-78 (questions to Wilma Goff regarding prior jury service), 425-26 (questions to James Simoneaux regarding prior jury service), 453-54 (questions to Anna Reber about the death penalty), 459-61 (questions to John Donnes regarding ability to consider insanity defense).

after the court ruled on challenges for cause were considered one at a time for peremptory strikes. The prosecution first accepted or struck a juror. If the juror was accepted by the prosecution, the defense then accepted or struck the juror. Each party exercised twelve peremptory strikes. Upon the completion of strikes after the questioning of the sixth panel, both sides had used all of their strikes and the jury of twelve had been selected. *See* JA 547-50.[12]

Although African Americans made up approximately 20% of the population of Jefferson Parish in 1996,[13] nine – 10.6% – of the eighty-five prospective jurors questioned in the six panels were black. JA 804. Four were dismissed for cause. *Id.* The prosecution used peremptory strikes to remove the remaining five. *Id.*

1. The Questioning and Acceptance of Jeffrey Brooks

Jeffrey Brooks, a 26-year-old African American student at Southern University, was in the first panel of jurors questioned. At the beginning of voir dire, Brooks

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[12] A seventh panel was questioned for the purpose of selecting two alternates. JA 551-87. Each side had one additional strike for the selection of alternates. JA 586. One of the alternates, Jacqueline Woods, was African American. *Id.* Neither alternate was needed during trial.

[13] African Americans made up 17.6% of the population of Jefferson Parish in 1990, *see* 1990 U.S. Census, http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_1990_STF1_DP1&ds_name=DEC_1990_STF1_&geo_id=05000US22051 (last visited Aug. 31, 2007), and 22.9% of the population in 2000. *See* 2000 U.S. Census, http://factfinder.census.gov/servlet/SAFFFacts?geo_id=05000US22051&_state=04000US22&pctxt=cr (last visited Aug. 31, 2007).

had expressed concern that jury service might interfere with observation of a class as part of his preparation for student teaching. JA 102-04. Brooks gave the name of his dean to the trial judge's staff. The trial judge later informed Brooks that the dean had been contacted and the dean had said that jury service through the remainder of the week would not be a problem. JA 116.[14] Brooks replied, "Okay." *Id.* Neither the court nor the parties asked Brooks whether he had any further concerns about observing classes, and he did not express any.

Prosecutor Williams prefaced his first question to the first panel with an explanation of the case and the death penalty that covered fifteen pages of transcript. JA 171-81. He then asked each juror individually if he or she could impose the death penalty. Brooks answered, "Yes." JA 186-87. The prosecutor asked Brooks two other questions – whether he could consider the insanity defense, JA 193-97, and what verdict he would return if the prosecution proved its case beyond a reasonable doubt. JA 206-07. Brooks answered that he "would listen" to evidence of insanity. JA 197-208. In response to the second question, Brooks replied, "Guilty." JA 206.

In response to defense counsel's questions, Brooks answered that his brother was in the Army Reserve, JA 217; that in deciding whether to credit a police officer's testimony over the defendant's, he "would weigh what I heard," JA 223; and that he could presume Snyder innocent. JA 230. Brooks asked for clarification with regard to

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[14] The trial was not expected to go beyond the coming weekend, *see, e.g.*, JA 204 (prosecutor Williams tells jurors "we're hoping that this case will be over by the weekend, by Saturday at the latest"). It started on Tuesday, August 27 and ended on that Friday, August 30.

two questions and volunteered answers in response to two other questions posed by defense counsel to the panel as a whole.[15] At the conclusion of questioning of the first panel, both sides accepted Brooks for service on the jury. JA 268. The prosecutor would later backstrike Brooks after the questioning of the fourth panel. JA 443.[16]

2. The Strikes of Gregory Scott and Thomas Hawkins

The prosecutors struck the only black prospective juror in the second panel, Gregory Scott, an African American engineer with the utility company Entergy. JA 306. In response to the three questions the prosecutor asked him, he answered that he could consider the death penalty, JA 308; that his wife's car had been stolen at gunpoint, JA 322; and that he could consider the insanity defense. *Id.* When questioned by the defense, Scott answered that his brother had been in the Marines, JA 326;

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[15] In response to a question about whether anyone had any dealings with mental illness, Brooks said, "I'm a future teacher, and I run into students who have different problems, retardation, things like that." JA 236-37. Asked whether he could presume Snyder innocent, Brooks responded with a question about the burden of proof with regard to the insanity defense. JA 229-30. In answer to defense counsel's question, "Can anybody think of a reason why a defendant might not testify?" Brooks volunteered, "He may say something to destroy his credibility, by accident." JA 240. Asked whether he would hold it against Snyder if he asserted the insanity defense, JA 208-09, Brooks asked whether the defendant or his lawyer makes the decision to rely on the defense.

[16] Although peremptory strikes were made after the questioning of each panel, the parties were allowed to "backstrike" jurors who had been accepted by both sides after the voir dire of earlier panels. *See* La. C. Crim. P. Art. 795(B)(1); *State v. Taylor*, 669 So. 2d 364, 376 (La. 1996) (describing the practice).

that he could consider evidence of domestic abuse solely to show motive and intent, JA 328; and that he could consider a verdict of manslaughter, JA 338-39, and a sentence of life imprisonment. JA 342. Asked about the defendant's right not to testify, Scott answered that he would want to testify if innocent, but would "consider the advice of the lawyers." JA 334-35. The prosecution struck Scott. JA 345. The defense noted Scott's race, but did not make a *Batson* challenge. *Id.*

After the questioning of the third panel, the prosecution struck Thomas Hawkins, an African American ship foreman at Shell Oil Refinery, JA 355. Hawkins answered that he could consider both imposition of the death penalty and a life sentence, JA 358, 364; that many of his friends were police officers in Jefferson Parish, JA 380; that he had served in the Army from 1966 to 1968, JA 383; and that he could apply the burden of proof. JA 392. Although he appeared confused during the State's questioning regarding the difference between the burden of proof regarding insanity and simply considering an insanity defense, upon subsequent questioning he answered that he could consider the insanity defense and hold the defense to its burden of proof. JA 369-70, 379. Nevertheless, the prosecution struck Hawkins. JA 400. Again, defense counsel noted that he was black. *Id.*

3. The Strike of Elaine Scott and the *Batson* Challenge

The prosecution struck another black juror in the third panel, Elaine Scott, a finance clerk and the mother of two sons, ages 8 and 18, whose husband worked at AT & T. JA 356.

The prosecutor asked Ms. Scott three questions which she answered in seven words. In response to the prosecutor's question to each juror regarding his or her ability to impose the death penalty, Scott answered, "I think I could." JA 361. The prosecutor then began to question each juror individually about his or her ability to consider a sentence of life imprisonment, but by the time he got to Scott, the question appeared to be whether she could consider a death sentence. JA 361-67.[17] She responded, "I could." JA 367. Asked if she could hold the defense to its burden of proving insanity, she answered, "Yes." JA 371. Questioned by defense counsel, Scott answered that it was possible that a police officer might not testify truthfully, JA 383; that she could consider manslaughter, JA 390-91; that she would apply the burden of proof, JA 392; that she could consider mitigating circumstances, JA 396; and that she and her brother-in-law had been in the Army. JA 384. Asked whether she thought Snyder should "get up and tell you what happened," Scott answered, "It's his right." JA 387.

The prosecution struck Scott. JA 401. Defense counsel objected pursuant to *Batson v. Kentucky*, noting that she

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[17] The prosecutor asked jurors individually whether they could consider life imprisonment, but before getting to Scott, the prosecutor, instead of questioning one juror, noted that previously the juror had said she could not consider the death penalty, and then called upon the next juror saying only, "Ms. Goff?" R. 367. Ms. Goff responded, "I could consider the death penalty." *Id.* The prosecutor responded, "You could consider both?" and Ms. Goff answered, "Yes, I would consider it." *Id.* The next four jurors, including Ms. Scott, responded that they could consider "it." *Id.* Depending upon how she understood the question, Ms. Scott responded, like the four jurors before her, that she could consider either life imprisonment or death.

was the third African American struck[18] and argued that "there has been a pattern." *Id.* The prosecutors responded that Scott was "very weak on her ability to consider the imposition of the death penalty," *id.*, and "very positive" about a life sentence. JA 401-02. Defense counsel countered, "[t]his lady indicated that she could consider both." JA 402. The trial court overruled the objection, saying only, "All right. I'm going to go ahead and allow the [peremptory] challenge." *Id.*

4. The Strikes of Jeffrey Brooks and Loretta Walker

After the questioning of the prospective jurors in the fourth panel, the prosecution backstruck Jeffrey Brooks, JA 443, who had been accepted after questioning of the first panel. JA 268. The prosecutors also struck the only other African American in the fourth panel, Loretta Walker. JA 447-48. Defense counsel challenged both strikes pursuant to *Batson*.

Prosecutor Williams said that he struck Brooks because he "looked very nervous to me throughout his questioning" and, that because Brooks "was going to miss class" he might want "to go home quickly," and thus "come back with guilty of a lesser verdict so there wouldn't be a penalty phase." JA 444. Defense counsel countered that the trial court had dealt with any concerns Brooks had about missing class by informing him his dean had said

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[18] Jeffery Brooks, an African American who had been accepted after questioning of the first panel, JA 268, had not yet been struck. The prosecutor backstruck him after questioning of the fourth panel. JA 443.

that it would not be a problem, and that Brooks looked no more nervous than anyone else. JA 445. The trial court overruled the objection, stating only, "All right. I'm going to allow the [peremptory] challenge. I'm going to allow the challenge." *Id.*

Prosecutor Williams said his reason for striking Walker was that she could impose the death penalty only under limited circumstances. JA 447. In response to the prosecutor's questioning, Walker had indicated that she could impose the death penalty if "he did some real bad things" like "child molestation. Killing a child." JA 417. She was not asked what other "bad things" would warrant the death penalty. The trial court overruled the objection, stating: "All right. The Court is going to allow the [peremptory] challenge." JA 448.

D. The Prosecution's Comparison of Snyder to O. J. Simpson in Rebuttal Argument at the Penalty Phase

The jury returned a verdict of guilty of first degree murder. R. 1363, 1366. The sentencing phase of the trial began and ended on August 30. During rebuttal closing argument, prosecutor Williams said that defense counsel's argument about Snyder appearing suicidal when he was arrested, "[m]ade me think of another case, *the most famous murder case in the last, in probably recorded history, that all of you all are aware of* – " JA 606 (emphasis added). The defense objected. In a conference at the bench, Williams argued that Snyder "pretended to kill himself, just like O. J." and "that's fair comment on something that's common knowledge." JA 606-07. The trial court overruled the objection, saying only, "I'm going to allow it." JA 607. Williams resumed his argument:

> The most famous murder case, and all of you all have heard about it, happened in California *very, very, very similar to this case*. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it*. Ladies and Gentlemen, is it outside the realm of possibility that that was what that man was thinking about when he called in and claimed that he was going to kill himself?

JA 607 (emphasis added). After two and a half hours of deliberations, the jury returned with a sentence of death. R. 1598.

E. The Motion for a New Trial

At the hearing on the motion for a new trial, defense counsel argued that because the prosecutor "had no earthly idea that he would get a death penalty in this case," JA 655, he "maneuvered the jury around to where it was all white," so that he could make the O. J. Simpson argument because "it's kind of hard to say things about a black defendant when there's one or two blacks on the jury." JA 659. The trial court denied the motion. JA 664-65. The court's only explanation for its *Batson* ruling was, "As to the *Batson* challenges, the Court believes that the D.A. explained sufficient race neutral reasons for his challenges." JA 665.

F. The Louisiana Supreme Court's Review on Appeal

The Louisiana Supreme Court affirmed the trial court's *Batson* rulings on appeal. In an opinion by Justice Kimball, the court held that "the State's proffered reasons [for the strikes] were plausible, supported by the record

and race-neutral." JA 777. Justices Lemmon and Johnson dissented. Justice Lemmon concluded that "the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O. J. Simpson 'got away with it.'" JA 733-32. Justice Johnson concluded, based on the prosecutor's resort to the Simpson case after promising the court he would not mention it, that "the prosecutor had a racially discriminatory purpose for excluding the African American jurors." *Id.* at 741.[19]

This Court vacated the judgment and remanded for reconsideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*). JA 757. On remand, the Louisiana Supreme Court again rejected the *Batson* claim, this time by a 4-3 vote. JA 759, 777-82 (*Snyder III*). The majority considered Snyder's *Batson* claim only in relation to the prosecution's strikes of Brooks and Elaine Scott because defense counsel had not lodged *Batson* objections to the earlier strikes of Gregory Scott and Hawkins,[20] and appellate counsel made "no argument with regard to Loretta Walker." JA 774. The majority quoted from Justice Kimball's original decision for the majority in *Snyder I*, JA 776-77, and again upheld the prosecutor's strikes, based

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[19] The court remanded the case to the trial court for a determination of whether Snyder had been competent during trial. JA 709-15, 731. In *Snyder II*, it affirmed a finding by the trial court that Snyder was competent at the time of trial. JA 742.

[20] Although petitioner included a question in his petition for *certiorari* regarding counsel's ineffectiveness in failing to ask for reasons for the strikes of Hawkins and G. Scott, this brief addresses only the *Batson* issue and presents no question of counsel's effectiveness.

upon its understanding of *Miller-El II*[21] and *Rice v. Collins*, 546 U.S. 333 (2006). JA 778-81. The majority reexamined and upheld the reasons for striking Brooks. The majority did not find that the prosecution's backstrike of Brooks, when compared to the acceptance of white prospective jurors, or the comparison of Snyder to O. J. Simpson were racially motivated, noting that the prosecutor did not mention the race of either Simpson or Snyder. JA 782-89.

Justice Kimball, the author of the majority opinion in *Snyder I*, joined by Chief Justice Calogero, dissented, finding that when reconsidered in light of *Miller-El II*, "the cumulative evidence of pretext is compelling and too powerful to conclude anything but intentional racial discrimination motivated the State's strike of Mr. Brooks." JA 799. Justice Johnson also dissented, concluding that reversal was required not only for the reasons stated in her dissent in *Snyder I*, but also because of the guidance provided by this Court in *Miller-El II*: consideration of the number of black jurors struck, the "side-by-side comparison" of black venire members who were struck and white venire members who were accepted by the prosecution, and the use of a backstrike through which the prosecutor masked his intent to strike African Americans by initially accepting Brooks, only to exclude him later. JA 804-06.

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[21] The majority characterized *Swain v. Alabama*, 380 U.S. 202 (1965), *Batson*, and *Miller-El II* as a "trilogy [that] presents a pendulous treatment by the Court of the issue of the evidentiary burden placed on a criminal defendant who claims that equal protection has been denied through the State's use of peremptory challenges to exclude individuals from the petit jury on the basis of race." JA 762. The majority explained that "in *Miller-El*, the Supreme Court moved the pendulum back toward middle ground," between *Swain* and *Batson*. JA 764.

The case is before this Court on writ of *certiorari* to review the decision of the Louisiana Supreme Court.

SUMMARY OF THE ARGUMENT

The dissenting justices on the Louisiana Supreme Court, based on a review of the entirety of the record and applying "the vigorous analysis" directed by this Court in *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), JA 789, correctly found that the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986), in using five peremptory strikes to remove one hundred percent of the black prospective jurors. JA 789-807. The dissenting justices recognized the "backdrop of the issues of race and prejudice" against which the prosecution made its strikes, JA 790; found the State's proffered reasons for striking African Americans lacked record support and were not credible in light of the prosecution's acceptance of white prospective jurors sharing the characteristics of the blacks who were struck; and concluded that the prosecutor's use of "the O. J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death . . . leave[s] no doubt . . . that the prosecutor had a racially discriminatory purpose for excluding the African American jurors." JA 802 (Johnson, J., dissenting).

The justices in the majority did not consider together "the totality of the relevant facts," as required by *Batson*, 476 U.S. at 96. The majority also failed to recognize and properly consider indicia of discriminatory intent identified by this Court in *Miller-El II*, such as the prosecution's use of its strikes to exclude one hundred percent of the prospective black jurors, the prosecution's failure to question black prospective jurors with regard to the reasons it

asserted for striking them, and the acceptance by the prosecutors of white jurors who had the same characteristics as those the prosecutors asserted as their reasons for striking blacks.

The majority also failed to recognize the discriminatory motive behind prosecutor Williams' acceptance of Jeffrey Brooks in the fist panel, JA 268, only to backstrike him later, JA 443, after the defense did not make *Batson* objections to the prosecution's strikes of two black prospective jurors. The majority closed its eyes to reality in failing to find that Williams' references to the O. J. Simpson case before trial and in closing argument were indicative of his intent in striking all of the black prospective jurors. And it gave a degree of deference to the trial court's rulings that exceeded the plain error standard and allowed the discriminatory selection of jurors to go uncorrected.

The record does not support the prosecutors' claim of nonracial reasons for striking Jeffrey Brooks. The prosecutors said that they struck Brooks because he was "nervous" and would be so concerned about getting back to his classes that he would return a verdict of guilt of a lesser crime to avoid a penalty phase. JA 444. However, as Justice Kimball observed in her dissent, the prosecutors put nothing on the record to support their assertion of "nervousness" after it was challenged by defense counsel. Brooks was "an engaged and voluble juror throughout the voir dire examination." JA 794 (Kimball, J., dissenting). Brooks' concern about missing class was fully satisfied by the judge's assurance that Brooks' dean had said his absence for jury duty would not be a problem. JA 116.

Nor is there any support in the record of the few words spoken by Elaine Scott for the reasons given by the

prosecutors for striking her – that she was weak on the death penalty and strongly favored a sentence of life imprisonment. JA 401-02. Scott never expressed either of those sentiments. The prosecutors did not question Brooks and Scott about their reasons for striking them even though they had ample opportunity to do so. The prosecutors also accepted white prospective jurors sharing the characteristics that they had identified as the reasons for their strikes. This is compelling evidence of their discriminatory intent. *Miller-El II,* 545 U.S. at 241-52.

The proper application of *Batson* and *Miller-El II* to all of the circumstances of this case clearly establishes the prosecutors' discriminatory intent in striking black prospective jurors. Therefore, this Court should reverse the decision of the Louisiana Supreme Court and remand this case with instructions to grant relief pursuant to *Batson v. Kentucky*.

ARGUMENT

THE PROSECUTION OBTAINED AN ALL-WHITE JURY BY STRIKING AFRICAN AMERICANS ON THE BASIS OF THEIR RACE.

I. THE PROSECUTION STRUCK ONE HUNDRED PERCENT OF THE AFRICAN AMERICAN PROSPECTIVE JURORS.

After the trial court ruled upon strikes for cause, five of the thirty-six prospective jurors from which the jury was selected were black. The prosecutors struck all five of them. R. 804. Thus, the prosecutors used close to half of

their twelve peremptory challenges to strike one hundred percent of the qualified African Americans, and used their remaining seven peremptory challenges to strike 23% of the white prospective jurors (seven out of thirty-one).

A similar disparity in the exercise of strikes was one of the reasons this Court found a *Batson* violation in *Miller-El II*. At Miller-El's trial, "'[t]he prosecutors used their peremptory strikes to exclude 91% of the eligible African American venire members. . . . Happenstance is unlikely to produce this disparity.'" *Miller El II*, 545 U.S. at 241 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (*Miller-El I*)). It is equally unlikely that happenstance produced the disparity in this case, as Justice Kimball observed in her dissenting opinion. JA 790.

The Louisiana Supreme Court did not take these remarkable statistics into account in its analysis. Instead, it found its "task eased by an initial winnowing out" of all but two of the black panelists, JA 774, concluding that it need not consider the strikes of the first two blacks struck because defense counsel did not object when they were struck, JA 774 & 774 n.13, and, on remand from this Court, appellate counsel for Snyder did not argue the validity of the prosecution's reasons for striking Loretta Walker. JA 773-74. However, while the defense did not ask for reasons for the first two strikes of blacks[22] and, as a

[22] As the Louisiana Supreme Court acknowledged, "[b]ecause the State had accepted Jeffrey Brooks in the first panel of prospective jurors, the strikes exercised against Greg Scott in the second panel and Hawkins in the third panel did not reveal any pattern of exclusions which might have supported an objection on *Batson* grounds." JA 774 n.13. Although defense counsel did not ask for reasons for the first two strikes upon asserting its *Batson* objection after a third African American was struck, prosecutor Olinde started to give reasons for

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result, the prosecution was not required to give reasons for the strikes at the second step of the *Batson* procedure,[23] defense counsel asserted a *Batson* claim after the strike of Elaine Scott because "there has been a pattern." JA 401. At that time the pattern was the strikes of three of four blacks considered; the prosecutors would later backstrike Brooks, JA 443, and strike one additional black prospective juror, JA 447-48, resulting in a pattern of five-for-five.

Miller-El II makes it clear that the prosecution's removal of all five black jurors was to be considered at step three of the *Batson* procedure,[24] where the Louisiana

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striking Hawkins, the second black person struck, but lead prosecutor Williams interrupted and stopped him, JA 403, as he did on another occasion when Olinde was going to give reasons for challenging a black juror excused for cause. JA 584-85.

[23] This Court adopted a three-step test in *Batson v. Kentucky* to determine whether a prosecutor intended to discriminate in using peremptory strikes. First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. *Batson*, 476 U.S. at 96-97. Second, upon such a showing, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.* at 97-98. Third, the court must determine, in light of all the evidence, whether the defendant has shown purposeful discrimination. *Id.* at 98.

[24] In *Miller-El*, the Petitioner pressed his *Batson* claim on direct appeal with regard to seven of the ten black jurors struck; in habeas corpus proceedings, he pursued it as to six. *Miller-El II*, 545 U.S. at 286 (Thomas, J., dissenting). This Court ultimately found that the prosecutor had discriminated in striking two of those jurors. *See id.*, 545 U.S. at 252 n.11. It based its holding on the totality of the evidence including, as a significant factor, the "remarkable" disparity in the State's use of ten of its fourteen strikes to exclude ten of eleven African Americans. *Id.* at 240-41. *See also, e.g., Siler v. State*, 629 So. 2d 33, 37 (Ala. Crim. App. 1993), *cert. denied*, 1993 Ala. LEXIS 1306 (Ala. Oct. 29, 1993) (*Batson* violation found where the prosecution used eleven of its fifteen strikes to remove eleven of twelve blacks from jury venire and failed to offer a "clear, specific, and legitimate reason" for its strike of one juror).

Supreme Court was to engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson,* 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). *See also Miller-El I*, 537 U.S. at 340 ("It goes without saying that [evidence at the third step of the *Batson* inquiry] includes the facts and circumstances that were adduced in support of the *prima facie* case."). The failure of the Louisiana Supreme Court majority to include the statistical disparity in the prosecution's strikes in its analysis was error.

II. THE LOUISIANA SUPREME COURT FAILED TO FOLLOW THIS COURT'S GUIDANCE IN *MILLER-EL II* IN ASSESSING THE PROSECUTORS' REASONS FOR THEIR STRIKES.

The analysis employed in *Miller-El II* involved scrutiny of the record to determine whether it supported the reasons given by the prosecution for its strikes, 545 U.S. at 244; whether the prosecution "engage[d] in any meaningful voir dire examination" of the jurors struck with regard to the reasons proffered for striking them, *id.* at 246 (quoting *Ex parte Travis,* 776 So. 2d 874, 881 (Ala. 2000)); whether the prosecution's reasons for striking them applied equally to white jurors who were not struck by the prosecution, *id.* at 241;[25] and whether there was manipulation of

[25] Comparisons of the prosecution's treatment of Brooks and Scott, two of the black prospective jurors struck, with its treatment of white jurors is much easier in this case than it was in *Miller-El II*. The voir dire in this case consisted of conclusory questions – usually answered with a few words – asked to eighty-five prospective jurors in a day and a half. In *Miller-El II*, this Court analyzed the extensive questioning of jurors over five weeks. *Id.* at 283 (Thomas, J. dissenting).

the process for racial purposes (the jury shuffle discussed in the *Miller-El* opinions; the backstrike in this case). *Id.* at 253-55. The Louisiana Supreme Court majority failed to follow this Court's guidance in *Miller-El II* in assessing those factors. Consideration of them, together with the other circumstances of this case, at *Batson*'s third step establishes that the prosecutors discriminated in striking Jeffrey Brooks and Elaine Scott.

A. The Prosecution's Reasons for Striking Jeffrey Brooks Are Not Supported by the Record and Are Belied By Its Questioning and Acceptance of White Jurors.

Both sides accepted Jeffrey Brooks after the questioning of the first panel of jurors. JA 268. After the questioning of the fourth panel, Prosecutor Williams used a backstrike to remove Brooks. JA 443. Brooks was the fourth African American struck. Williams gave two reasons for striking Brooks:

> . . . Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is that for that reason, that being he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.
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> . . .

> . . . If this case goes to the jury on Friday and one of them gets back there and gets smart and thinks that if they come back guilty of second degree murder, they won't have to do a penalty phase. . . .

JA 444-45. Defense counsel countered, "His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school . . . and the Dean said that wouldn't be a problem. . . . As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous." JA 445. Prosecutor Olinde responded, "he was very uncertain and very nervous looking." *Id.* The trial court overruled the *Batson* objection, saying only, "All right. I'm going to allow the [peremptory] challenge. I'm going to allow the challenge." JA 445.

Brooks was surely no more nervous or uncertain when the prosecutors backstruck him after questioning of the fourth panel than when the prosecutors accepted him after questioning of the first panel. "[S]trikes based on vague references to attributes like demeanor 'are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race.'" *State v. McFadden*, 191 S.W.3d 648, 655 (Mo. 2006) (citation omitted).[26] As Justice Kimball observed,

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[26] *See also, e.g., Dorsey v. State*, 868 So. 2d 1192, 1199 (Fla. 2003) ("[T]he proponent of a strike based on nonverbal behavior may satisfy its burden of production of a race-neutral reason during the second step of the process . . . only if the behavior is observed by the trial court or otherwise has record support."); *Commonwealth v. Maldonado*, 788 N.E.2d 968, 973 (Mass. 2003) ("Challenges based on subjective data such as a juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination."); *Beartusk v. State*, 6 P.3d 138, 143

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"the record contains no objective support" for the reason, but "tends to belie" it as Brooks appeared to be "an engaged and voluble juror throughout voir dire examination." JA 794; *see also* JA 798 (Brooks appeared "engaged, forthcoming and communicative").[27]

As Justice Kimball noted, the prosecution did not respond to defense counsel's assertion that nervousness was a universal characteristic of the prospective jurors "by making a comparison of [Brooks'] alleged nervousness to the demeanor of other panelists that the State found acceptable . . . [and] made no effort to demonstrate that its motivation for the strike was benign, or to develop a record of objective support for its characterization." JA 793. *Cf. State v. Hobley*, 752 So. 2d 771, 784 (La. 1999) (prosecution's reason upheld where defense counsel "neither disputed the explanations of inattentiveness given by the

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(Wyo. 2000) ("Purely subjective impressions of a juror's qualities alone without objective support cannot suffice; such rationales could too easily be used to mask discrimination." (citing *State v. Cruz*, 857 P.2d 1249, 1253 (Ariz. 1993)).

[27] Brooks provided thoughtful and well-reasoned responses to the questions he was asked. *See, e.g.*, JA 222-23 (when asked by defense counsel whether he conceivably could believe the testimony of Snyder over that of a police officer, he responded that he would "weigh what [he] heard."); JA 208 (in response to defense counsel's question about whether he would hold defense counsel's decision to enter an insanity plea against counsel and not Snyder, Brooks asked, "The final decision is his, isn't it?"); JA 229-30 (when asked whether he could accord Snyder the presumption of innocence, he asked how that fit with the earlier explanation that the defense bore the burden of proving insanity); JA 240 (when defense counsel asked the panel whether anyone could think of a reason that a defendant might not testify, Brooks volunteered, "[h]e may say something to destroy his credibility, by accident."). As Justice Kimball observed, "[a]nswers and interactions such as these are not the kind that reasonably might be expected of someone who looked 'very nervous' and 'very uncertain.'" JA 794.

prosecutor nor developed a record of evidence contradicting those explanations").[28]

In response to the trial court's initial inquiry as to whether any prospective jurors had other obligations that might interfere with serving on the jury, Brooks said that he was an education student at Southern University and had just begun two weeks of observation of teaching prior to his own student teaching. JA 102-03. He provided the court with the name of his dean and, a short time later, the trial judge told Brooks, "We talked to Doctor Tillman and he says he doesn't see a problem as long as it's just this week. . . . Okay?" JA 116. Brooks replied, "Okay." *Id.* Neither Brooks, the parties, nor the trial court raised his need to attend class again. The trial was not expected to last past the end of the week, and it did not.[29] There is no reason to believe that, once assured by the trial judge that his brief absence from school was not a problem, Brooks had *any* concern about "missing class."

"Had Mr. Brooks's concern about his student teaching commitments genuinely mattered to the State, it would seem to reason that the State would have questioned him about it to determine the extent of his concern." JA 792 (Kimball, J., dissenting) (citing *Miller-El II*, 545 U.S. at 246). Yet, "[n]o attempt was made by the State to verify its

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[28] The Louisiana Supreme Court majority found Brooks "articulate during the voir dire" but suggested that this confirmed the prosecution's fear that he might "get smart" during jury deliberation and return a verdict of a lesser offense to avoid a penalty phase. JA 781. Neither the majority nor the prosecution ever squared Brooks' alleged "nervousness" and "uncertainty" with his articulateness.

[29] The prosecutor repeatedly stated that he expected the trial to "be over by Saturday." JA 111; *see, e.g.*, JA 105, 121, 130, 204; R. 451. In fact, the trial concluded on Friday, August 30, 1996. JA 38.

hypothesis and develop an objective basis for the strike." JA 792 (citing *Miller-El II*, 545 U.S. at 250).

The Louisiana Supreme Court majority upheld the reasons given for striking Brooks, first citing Justice Kimball's opinion for the majority in *Snyder I*,[30] and then announcing that its review on remand "uncovered a factor favorable to the State[] . . . not mentioned in *Snyder I*." JA 778-79. That factor was the prosecution's "consistent[] inquir[y] of a potential juror whether or not his or her particular problem would prevent concentration on the evidence so as to impair the juror's decision-making task." JA 779. But this factor weighs against the prosecutors' reason for striking Brooks. The prosecutors did not even ask Brooks whether he had any concerns after he had been assured by the trial court that his dean had said that missing a few days of school would not be a problem. Nor

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[30] In *Snyder III*, the Louisiana Supreme Court quoted the following from its decision in *Snyder I*:

> Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. [Citations omitted.] The prosecutor's reasons constituted "legitimate" grounds for the exercise of a peremptory strike. [Citation omitted.] None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent.

JA 777 (quoting *Snyder I*, JA 681, 750 So. 2d at 841-42).

did the prosecutors ask whether, if Brooks were to have such concerns, they might interfere with his ability to concentrate as a juror.

Prosecutor Williams could have asked Brooks the same question he asked a white juror, Ronald Laws, who explained that the week of jury service was "bad timing" for him because he was a self-employed contractor with two houses near completion, which needed to be finished because one owner was moving in "this weekend, the other next weekend," and, due to his wife's recent hysterectomy and because he had no family in the area, he was "running the kids back and forth to school." JA 129-30. Prosecutor Williams asked him whether, if he were "stuck on jury duty anyway for about three or four days, til the end of the week," it would cause Laws "such concern that [he] wouldn't be able to listen to the evidence in the case" or if he would try to make other arrangements as best he could. JA 130. Laws responded, "I'd have to make other arrangements as best I could." *Id.*

When the trial court told Laws that it would not excuse him, Laws replied, "Okay," JA 130 – the same response that Brooks gave when told that the dean of his program did not think jury service would be a problem. JA 116. Prosecutor Williams apparently had no worries that Laws might "get smart" and return a lesser verdict in order to get back to his livelihood and his children.[31] The prosecution accepted Laws and he was one of the twelve jurors selected to hear the case. JA 549-50.

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[31] The prosecutors never explained why they believed Brooks was more likely than any other prospective juror to "get smart" and violate his oath as a juror in order to get home early.

The prosecutors also accepted "with no evident reservations" other prospective jurors who actually expressed concerns like those they asserted for striking Brooks. *Miller-El II*, 545 U.S. at 244. The prosecutors accepted Arthur Yeager, a white man who sat as a juror, even though he was reluctant to serve because he had "a long-standing commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." JA 468.

The prosecutors also accepted Michael Sandras, a white male, who taught at the University of New Orleans and expressed concern that his teaching responsibilities would cause him to have trouble concentrating. JA 467. Unlike Brooks who was going to observe class, Sandras was a university professor teaching students in a semester that had already started. *Id.* Unlike Brooks, who was not asked about any trouble concentrating and did not voice such concerns, Sandras expressed concern about concentrating. Nonetheless, the prosecution accepted Sandras, who was removed by defense counsel's peremptory strike.[32]

The prosecutors also accepted Brendan Burns, a single parent and the manager of a landscape maintenance company, who expressed concerns about responsibilities at work, caring for his two daughters, ages 14 and 17, as well as his 89-year-old grandparents. JA 104-05. The prosecutors also accepted John Donnes, who told the

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[32] The fact Sandras and other prospective jurors were struck by the defense is not relevant to the prosecution's motives in accepting them. Here, as in *Miller-El II*, "the defense did not make a decision to exercise a peremptory until after the prosecution decided whether to accept or reject, so each was accepted by the prosecution before being ultimately struck by the defense." *Miller-El II*, 545 U.S. at 245 n.4.

court that he was worried about "cancel[ing] too many things" including a "serious appointment" that would have to be postponed. JA 467-68. The defense struck them after they had been accepted by the prosecution. JA 268, 547.

The Louisiana Supreme Court distinguished the strike of Brooks from the acceptance of Yeager and Sandras based upon the fact that Yeager and Sandras "were employed and apparently already had established careers; Brooks, on the other hand, was attempting to complete his college courses in order to begin a career in teaching," JA 780-81, and found that Brooks was "truly concerned" because he "approached the bench on his own volition" while Yeager and Sandras merely responded to questions asked of their panels. JA 781.

But Brooks approached the bench – as did Ronald Laws and Brendan Burns – in response to the trial court's directive that jurors who had obligations that might interfere with jury service approach the bench and describe them. That Brooks came forward is indicative only of his responsiveness to the trial court's question. Brooks expressed no concerns after the trial court told him that his dean said missing a few days of class would not be a problem. On the other hand, Laws, Yeager, Sandras, Burns and Donnes actually expressed concerns about maintaining their businesses, taking care of their families, and meeting important appointments.

The State's proffered reasons for striking Brooks simply do not hold up when considered in light of the entire record. As in *Miller-El*, "[t]he whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking [Brooks] in an implausible light. Comparing his strike with the treatment of panel members

who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252.

B. The Prosecution's Reasons for Striking Elaine Scott Are Not Supported by the Record and Are Belied by Its Questioning and Acceptance of White Jurors.

The two prosecutors gave different reasons for striking Elaine Scott, neither of which is supported by the record. Prosecutor Williams stated, "I observed she was very weak on her ability to consider the imposition of the death penalty. . . . I wrote it down, that she thinks she could, and that's the reason for our challenge." JA 401. Prosecutor Olinde said, "My notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – her agreement that she could do that." JA 402. Defense counsel countered that she "indicated she could consider both. . . . She also said she could consider the death penalty." *Id.* The court overruled the *Batson* challenge, stating, "All right. I'm going to go ahead and allow the [peremptory] challenge." *Id.*

Scott did not express either of the sentiments attributed to her by the prosecutors. If the prosecutors had concerns about Scott's attitudes with regard to the death penalty or life imprisonment, they could have asked her more than one conclusory question about each one, but they did not do so.

After Scott and the other jurors in the third panel introduced themselves, JA 355-56, prosecutor Olinde asked each person in the panel if he or she could consider the imposition of the death penalty, eliciting initial responses

of one to five words. JA 358-61. Scott replied, "I think I could." JA 361. Prosecutor Olinde asked her no other questions about the death penalty, but proceeded to question the next prospective juror. *Id.* After asking all the prospective jurors if they could consider the death penalty, the prosecutor then asked each juror if he or she could consider mitigating circumstances and a sentence of life imprisonment. JA 361-66. However, before getting to Scott, the prosecutor's question changed from one about a life sentence to one about the death penalty:

The State:	Ms. Alvarez, you said that you could not impose the death penalty. Ms. Goff?
Ms. Goff:	I could consider the death penalty.
The Defense:	I'm sorry, I couldn't hear.
The State:	You could consider both?
Ms. Goff:	Yes, I would consider it.
The State:	Ms. DuBois?
Ms. DuBois:	I could consider it, yes.
The State:	Mr. Saracione?
Mr. Saracione:	I could consider it.
The State:	Mr. Saulino, sir?
Mr. Saulino:	I could consider it.
The State:	Ms. Scott.
Ms. Scott:	I could.

JA 367. The prosecutor's next and last question to Scott was whether she could hold the defense to its burden of proving insanity, to which she replied, "Yes." JA 371.

Defense counsel did not question Scott about the death penalty and touched upon a life sentence only tangentially, asking if she could "consider mitigating circumstances, you know, a person's upbringing or the kind of life that he led." JA 396. Scott answered, "Right." *Id.* (Other jurors in the third panel had answered questions with the single word "right" eight times before Scott gave it as a response. JA 371, 376, 385, 389, 394.) Except in answering that she and her brother-in-law had been in the Army, JA 384, Scott was equally concise in answering the other defense questions: "Yes." JA 383 (agreeing, as did eight other jurors in her panel, that a police officer might not testify truthfully); "It's his right." JA 387 (in answer to whether a defendant should testify); "I can." JA 390-91 (affirming that she could consider manslaughter); and "Yes." JA 392 (in answer to whether she would apply "that very serious standard of proof").

The few words spoken by Scott in answer to the conclusory questions asked by the lawyers do not support the reasons given by the prosecution for striking her. She did not say what the prosecutor claimed – that "she was very positive . . . about a life sentence." JA 402. Even if Scott had understood the prosecutor's second question to her to be about a life sentence instead of the death penalty, her answer – "I could" – was no different from that of at least six other prospective jurors in her panel who also said they "could." Prospective jurors DuBois, Saracione, and Saulino who answered "I could consider it" right before Scott answered "I could," JA 367,[33] were accepted by

[33] Saracione and Scott also gave the identical answer, "right," when asked if they could consider mitigating circumstances. JA 394, 396. Scott and Saulino also gave virtually identical answers when asked if

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the State. JA 401. DuBois and Saracione served on the jury. JA 28 (clerk's minutes, listing the twelve jurors who served). Saulino was removed by the defense with a peremptory challenge. JA 401. As in *Miller-El II*, the prosecutor "simply mischaracterized [Scott's] testimony," *Miller-El II*, 545 U.S. at 244, in representing that she enthusiastically endorsed a life sentence over the death penalty.

As with Brooks, the prosecutors did not follow up with any questions to Scott to clarify her attitudes with regard to either the death penalty or life imprisonment. They certainly could have asked those questions. The lawyers were allowed to question individual jurors at length, as they did at various points throughout the voir dire.[34] Prosecutor Williams could have questioned Scott as he questioned a white juror, Mary Calligan, who responded that she was "not really sure" she could impose the death penalty. JA 285. Williams questioned her for over three pages of transcript, JA 285-87, 288-89, until she finally answered, "it would be extremely hard for me to impose the death penalty." JA 289.

In light of the prosecution's failure to ask Scott even one follow-up question about her attitudes on the death penalty or life imprisonment, the prosecutors' reasons – that Scott was "very weak on her ability to consider the imposition of the death penalty" and "very positive" about a sentence of life imprisonment – are simply "unworthy of

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they would hold it against Snyder if he did not testify, Scott answering, "It's his right," and Saulino answering, "It's his right. It's the law" and "That is his right." JA 387.

[34] *See supra* note 11.

credence." *Miller-El II*, 545 U.S. at 241 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000)).

C. The Backstrike of Brooks is Evidence of Discriminatory Intent.

The prosecution's tactic of accepting Brooks, the first black prospective juror, to lull the defense lawyers into not making a *Batson* challenge when it struck the next two black jurors, and then backstriking Brooks is evidence of intent to discriminate when considered with all of the other circumstances of this case. *See* JA 800 (Johnson, J., dissenting) (quoting her earlier dissent in *Snyder I*). The backstrike "can be used in an equally discriminatory fashion" as the jury shuffle used by prosecutors to discriminate in *Miller-El*.[35] *Id.* at 805. Justice Kimball found the backstrike of Brooks "suspicious" and those "suspicions . . . [were] not eased when the voir dire of Mr. Brooks is considered alone or when it is considered along with that of other panelists." JA 791 (Kimball, J., dissenting). She found the use of the backstrike part of the "cumulative evidence of pretext" that convinced her that the "trial court's decision to allow the strike of Mr. Brooks was clearly erroneous." JA 799.

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[35] *See Miller-El II*, 545 U.S. at 253-55 (describing the use of Texas' "jury shuffle," which allowed the prosecutor to have panels with significant numbers of African Americans at the front of the panel randomly rearranged so that these prospective jurors might be reseated at the back of the panel where they were less likely to be reached).

III. WILLIAMS' ARGUMENT BASED ON THE O. J. SIMPSON CASE IS INDICATIVE OF HIS DISCRIMINATORY INTENT IN STRIKING BLACK JURORS.

Having used his peremptory strikes to obtain an all-white jury, prosecutor Williams played the race card in closing argument at the penalty phase. The defense had seen it coming and moved before trial for an order prohibiting Williams from making any reference to the O. J. Simpson case before the jury. JA 48-54. Williams gave the court his word "as an officer of the court" that he would not mention the O. J. Simpson case. JA 53. And yet, in his rebuttal argument – the last words the jury heard from any lawyer – Williams invoked the "the most famous murder case in the last, in probably recorded history, that all of you all are aware of – " JA 606. The defense objected and, at a bench conference, said, "He's going to mention the O. J. Simpson trial." JA 606. Williams responded that the reference was "fair comment on something that's common knowledge." JA 607. The trial judge overruled the objection, saying only, "I'm going to allow it." *Id.*

Williams continued: "The most famous murder case, and all of you all have heard about it, happened in California very, very, very similar to this case." JA 607. He then argued that Snyder, before his arrest, "when he called in and claimed that he was going to kill himself," was imitating O. J. Simpson, who "got away with it." JA 607.[36] It was an argument that was much more likely to be

[36] Snyder could not possibly have pretended to be suicidal based on knowledge that O. J. Simpson had been acquitted after feigning suicide. Snyder's crime occurred on August 16, 1995, close to two months *before* the jury's verdict in the Simpson trial on October 3 of that year.

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well received by white jurors than black jurors and probably would not have been made if any African Americans were on the jury. *See* JA 734 (Lemmon, J., dissenting) (finding "compelling" the question of "whether the prosecutor would have ranted about O. J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire").

Williams' invocation of the O. J. Simpson case in breach of his promise "as an officer of the court" is indicative of both his intent in striking African American jurors and the credibility of the reasons he proffered for striking them. The closing argument revealed beyond any question that neither Williams nor the reasons he gave for striking jurors were worthy of belief. The Louisiana Supreme Court majority erred in disregarding this evidence of Williams' discriminatory intent and his dishonesty.

Defense counsel filed two motions before trial seeking orders to prevent Williams from comparing Snyder's case to the O. J. Simpson case at trial and in the media. JA 48, 55. As the defense urged in both motions, the references were irrelevant, prejudicial, and racially divisive. JA 48-49, 55-56. In response to the motion for an order to keep him from mentioning the Simpson case before the jury, Williams beseeched the court, "[t]rust me, trust me[,]" and promised "as an officer of the court" that he would not "*before the jury in this case, mention the O. J. Simpson case.*" JA 53 (emphasis added). He reiterated, "I give the Court my word that I won't do this." *Id.* The trial court

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Moreover, as Justice Johnson pointed out in dissent, "At this point, the defendant had already been convicted of the crime, so there was nothing for him to 'get away with.'" JA 801 (Johnson, J., dissenting) (quoting her earlier dissenting opinion in *Snyder I*).

denied the motion "[b]ased on Mr. Williams' representations." JA 54.[37]

A majority of the Louisiana Supreme Court, after observing that Williams broke his promise, but not criticizing him for it, concluded that Williams' reference to the Simpson case was an appropriate response to defense counsel's closing argument regarding Snyder's suicidal behavior and did not indicate any racially discriminatory intent because neither the prosecutor's pretrial remarks[38] nor his penalty phase argument "referred to Simpson's or Snyder's race." JA 787.

Ignoring the racial implications of the O. J. Simpson case ignores the time and place of Snyder's trial.[39] The

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[37] The trial court also denied the defense motion to prohibit Williams from comparing this case to the Simpson case in the media after Williams told the court he had no intention of talking to the press during the case in chief. JA 57c.

[38] In considering the inferences that could be drawn from Williams' pretrial comments, JA 786-87, the majority did not address Williams' comments to the media or his remarks at the hearings on the defense motions which sought to prevent him from making further comparisons of Snyder's case with the Simpson case. JA 48-57d. Instead, it examined only Williams' comment that "the Simpson trial involved alleged domestic violence" made at a hearing on July 29, 1996, to address the admissibility of prior acts of domestic violence. JA 782.

[39] The Louisiana Supreme Court twice noted that evidence regarding the O. J. Simpson case was not part of the record. JA 783-84 n.19, 787. This is precisely why Williams should not have argued it. However, once Williams compared Snyder to O. J. Simpson, the justices of the Louisiana Supreme Court were not required to "be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J.) (plurality opinion). Four justices in *Snyder I* and *Snyder III* strongly disagreed with the majority's conclusion that the prosecutor's invocation of the Simpson case was race neutral. JA 790-91, 799 (Kimball, J., joined by Calogero, C. J., dissenting in *Snyder*

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trial occurred less than a year after Simpson's acquittal in the "trial of the century."[40] The deep divisions along racial lines over issues of race and fairness in the criminal justice system that resulted from the verdict, with many white people believing that Simpson "got away with it," were observed by commentators,[41] the media,[42] and public

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III); *id.* at 801 (Johnson, J., dissenting) (quoting her dissent in *Snyder I*); *id.* at 731-34 (Lemmon, J., dissenting in *Snyder I*).

[40] Nearly every major newspaper in the United States called Simpson's case "the trial of the century." *See, e.g.*, Sheryl Stolberg, *The Simpson Legacy: Just Under the Skin, Will We Ever Get Along?* L.A. Times, Oct. 10, 1995, §S, at 3; Saundra Torry, *The Verdict Is In: These Forecasters Didn't Fare Too Well*, Wash. Post, Oct. 9, 1995, at F7; *The Simpson Verdict*, N.Y. Times, Oct. 4, 1995, §A at 20 (editorial). At the time of Snyder's trial in August, 1996, two books about the case were best sellers. *See Best Sellers List*, N.Y. Times Book Review, Aug. 4, 1996, at 26 (listing among top-ten best selling non-fiction books, Vincent Bugliosi, Outrage: The Five Reasons Why O. J. Simpson Got Away with Murder (1996), and Christopher A. Darden, In Contempt (1996).

[41] *See, e.g.*, Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 Geo. Wash. L. Rev. 173, 173 (1996) ("Many African Americans believe that Simpson was prosecuted because he is black, while many white Americans believe that the jury acquitted Simpson because it was predominantly black. Both groups suspect that race negatively affects the judicial process, but they cannot agree on how it does so.").

[42] *See, e.g.*, Sheryl Stolberg, *supra* note 40. ("[S]omething just as insidious and destructive [as lunch counter boycotts, calling out the National Guard and city blocks 'in flames'] is occurring – a verbal riot of sorts, as people of all colors, but particularly blacks and whites, vent their elation and their frustration over the outcome of the 'Trial of the Century.' "); Paul Hefner, *Races Split over L.A. Police*, Times-Picayune, New Orleans, La., Oct. 4, 1995, at A2 ("Most white people were certain O. J. Simpson was guilty. Most African Americans believed him innocent. And neither could make sense of the other's point of view."); Cynthia Tucker, *Acts of Grace and Heroism in 1995*, Times-Picayune, Jan. 1, 1996, at B5 ("The reaction to the O. J. Simpson verdict suggested an America where whites and blacks view the same evidence and come to stunningly different conclusions, an America where justice is not blind but avowedly color-conscious.").

opinion polls.[43] Other courts have recognized the racial implications of invoking the O. J. Simpson case even in the absence of the other circumstances present in this case.[44] Moreover, prosecutor Williams' strikes of all the black prospective jurors insured that he made the argument to an all-white jury selected from a parish that had been carried by a white supremacist in primaries for the U.S. Senate and governor just a few years earlier[45] and had long been divided along racial lines over the policies of its chief law enforcement officer, its elected sheriff.[46]

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[43] *See supra* note 8.

[44] *See, e.g., DeFreitas v. State*, 701 So. 2d 593, 601 (Fla. App. 1997) (reversing conviction, *inter alia*, because prosecutor's comparison of defendant with O. J. Simpson in closing argument was inflammatory and appealed to the passions and prejudices of the jury); *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998) (holding that comparison of defendant with Simpson was prosecutorial misconduct).

[45] *See supra* notes 2-4 and accompanying text. Petitioner does not suggest that the extreme racial animus apparently felt by some members of the white community was shared by all. But the fact that hostility toward blacks was pronounced among some is also indicative of Williams' intent. He knew that by selecting an all-white jury there was a likelihood that his appeal to race would play on the resentments of at least some members of the jury. David Duke received approximately 40% of the vote when he carried the Jefferson Parish in primaries for senator and governor in 1990 and 1991. *See supra* notes 3 & 4. Approximately 20% of the population of Jefferson Parish is African American. *See supra* note 13. Thus, even a fair jury selection process would be likely to result in more people who voted for Duke than African Americans on a jury. By striking all of the African Americans, Williams made it even more likely that he would have a receptive audience for his argument.

[46] Two years before Snyder's trial, a *Times-Picayune* poll showed that support for the sheriff broke "generally along the racial lines of the parish, where 18% of the population is black." Bill Walsh, *No One Neutral About Harry Lee*, Times-Picayune, New Orleans, La., March 20, 1994, at A1. Despite the concerns of the black community, the sheriff handily won re-election in 1995 with 71% of the vote. *Top Ten West*

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The Louisiana Supreme Court majority upheld Williams' argument as a proper response to defense counsel's description of Snyder at the time of his arrest:

> . . . He was suicidal. He kept saying, "They're coming to get me. They're coming to get me." . . . [T]here's never been any indication that Mr. Snyder was somehow staging that particular incident in order to get himself a better situation or a better sentence or to help himself out in any way.

JA 784. While this argument by defense counsel may have invited a response *based upon the evidence before the court*, it hardly gave Williams license to go outside the record and invoke a sensational case which had resulted in divisions along racial lines.

An honest, ethical prosecutor, who felt that he was somehow compelled to raise the O. J. Simpson case in argument after promising the trial judge that he would not, would have approached the bench before the rebuttal argument, explained to the judge and defense counsel the reasons for his change of position and requested permission to mention the case. But Williams did not do that. He sprang the reference to the Simpson case in mid argument, catching the court and counsel by surprise. As Justices Johnson and Lemmon stated in their dissents in *Snyder I*, "It is blatantly clear that the prosecutor did not intend to keep his word," JA 801 (Johnson, J., dissenting) (quoting her earlier dissent in *Snyder I*), and "the prosecutor's intention to utilize racial bias became crystal clear

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Bank Stories of 1995, Times-Picayune, New Orleans, La., Dec. 31, 1995, at 1F.

when he commented during closing argument in the penalty phase that O. J. Simpson 'got away with it.'" JA 732-33 (Lemmon, J., dissenting).

IV. THE LOUISIANA SUPREME COURT ERRED WITH REGARD TO THE DEFERENCE IT GAVE THE TRIAL COURT'S RULINGS.

As previously set out, the Louisiana Supreme Court failed to accord the appropriate legal significance to factors identified by this Court in its *Miller-El* decisions and it failed to consider that evidence cumulatively at *Batson*'s step three as required by *Batson* and *Miller-El II*. It further erred in deferring completely to the trial judge's summary rulings.

The Louisiana Supreme Court majority purported to apply the "clearly erroneous" standard in reviewing the trial court's rulings on the *Batson* challenges. JA 766 n.6, 787.[47] However, it employed a degree of deference that would virtually eliminate appellate review of *Batson* issues. It concluded that a finding of discrimination "*would be an improper substitution of this court's evaluation for that of the trial court*" and that the record in this case "simply does not demonstrate that a reasonable

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[47] The Louisiana courts have held that a fact finding is clearly erroneous "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hernandez v. Bunge Corp.*, 814 So. 2d 783, 793 (La. App. 2002) (quoting *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992) (internal citation omitted)). *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (defining "clearly erroneous" as "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks." JA 788 (emphasis added).[46]

The deference accorded the trial court is particularly unwarranted in this case, where, as both the Louisiana Supreme Court majority and dissenters pointed out, the trial court did not actively participate in jury selection and gave no reasons for its rulings. JA 787 (majority opinion); *id.* at 798, 799 (Kimball, J., dissenting); *id.* at 806 (Johnson, J., dissenting).

Even under the more demanding habeas corpus standard – not applicable here – "'[d]eference does not by definition preclude relief.'" *Miller-El II*, 545 U.S. at 240

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[46] The majority's error appears to be the result, in part, of its reliance on this Court's decision in *Rice v. Collins*, 546 U.S. 333 (2006), which it viewed as this Court's "most recent admonition" on "the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the *Batson* analysis." JA 772. However, in *Collins*, both the California courts and this Court found record support for the prosecutor's race-neutral justification that the stricken juror was young and lacked stable community ties and, unlike this case, found no record basis for discrediting the prosecutor's factual account of the juror's eye rolling. *Collins*, 546 U.S. at 339-40. Moreover, the "backdrop of the issues of race and prejudice" present in this case, JA 790 (Kimball, J., dissenting), was absent in *Collins*. Finally, because *Collins* was a federal habeas corpus case, the issue there was whether the state court's conclusions constituted "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *Collins*, 546 U.S. at 338. That statute did not apply to the direct appeal to the state supreme court in this case. *See id.* at 338-39 (noting that the trial court's credibility findings are reviewed on direct appeal in the federal courts (as in the Louisiana Supreme Court) for clear error, citing *Hernandez v. New York*, 500 U.S. 352, 364-66 (1991), but a state court's findings are reviewed in habeas corpus cases under the more demanding "unreasonableness" standard of § 2254(d)(2)).

(quoting *Miller-El I*, 537 U.S. at 340). However, in this case, the Louisiana Supreme Court defined deference so broadly as to preclude relief.

V. ALL OF THE CIRCUMSTANCES OF THE CASE, CONSIDERED TOGETHER IN ACCORDANCE WITH *MILLER-EL II*, ESTABLISH A *BATSON* VIOLATION.

This Court summarized its findings in *Miller-El II* as follows:

> . . . By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.
>
> It blinks reality to deny that the State struck [two black prospective jurors], included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. . . .

545 U.S. at 266.

The reality is equally clear here. Prosecutor Williams knew that it would not be easy to convince a jury to sentence Allen Snyder to death. He increased his chances significantly by striking one hundred percent of the black prospective jurors.

The reality is that Williams struck Brooks and Scott, who were included in that one hundred percent, because they were black. As has been shown *supra* in Section II, the reasons Williams gave for striking them do not withstand scrutiny. Race mattered in this case – from Williams' pretrial comments that this was his "O. J. Simpson" case, to his striking every black prospective juror, to his comparison of Snyder with O. J. Simpson in his rebuttal argument. Here, as in *Miller-El II*, when the "evidence on the issues raised is viewed cumulatively, its direction is too powerful to conclude anything but discrimination." *Miller-El II*, 545 U.S. at 265.

To ignore this reality, as the Louisiana Supreme Court majority did, "invites cynicism respecting the jury's neutrality," and "undermines public confidence in adjudication."[49] This is well established by cases ranging from the "trial of the century" to those which are noticed only in the courthouses and communities in which they are tried.[50] Unless the rule of *Batson v. Kentucky* is enforced in Snyder's case and others like it, the rule itself will become a

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[49] *Miller-El II*, 545 U.S. at 238 (quoting *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Powers v. Ohio*, 499 U.S. 400, 412 (1991); *Batson v. Kentucky*, 476 U.S. at 87). *See also* JA 799-800 (Johnson, J., dissenting) ("I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all-white jury for this black defendant.") (quoting her dissent in *Snyder I*).

[50] *See* Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. Rev. 703, 710-13 (1998) ("What becomes apparent in evaluating juries is the impact of jury demographics on the public's acceptance of verdicts and the public's perception of justice.").

source of cynicism that undermines public confidence in the judicial system's commitment to fair and equal justice.[51]

Last term, Justice Kennedy observed:

> Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. *The enduring hope is that race should not matter; the reality is that too often it does.*

Parents Involved in Community Schools v. Seattle School District, ___ U.S. ___, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring) (emphasis added).

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[51] *See, e.g., People v. Randall*, 671 N.E.2d 60, 65 (Ill. App. 1996) ("We now consider the charade that has become the *Batson* process. . . . The State may provide the trial court with a series of pat race-neutral reasons. . . . [W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.' "); Steve Bogira, Courtroom 302: A Year Behind the Scenes in an American Criminal Court House 260-62 (2005) (commenting, based upon a year of observing proceedings in one courtroom in Chicago, that "it's lucky that most of the jury-picking is being done in [a] back room, because as usual the process is anything but color-blind" and reporting that reasons such as "indicated that he would use objective reasoning" and demeanor "not satisfactory to the state" were upheld as race neutral under *Batson*).

The reality here is that the opportunity for jury service was denied to black citizens of Jefferson Parish because race mattered to the prosecutors in exercising their peremptory strikes.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Louisiana Supreme Court and remand this case with directions that it grant Snyder relief pursuant to *Batson v. Kentucky*.

Respectfully submitted,

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